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THE YALE LAW JOURNAL POCKET PART

ELLEN D. KATZ

Mission Accomplished?

Is Texas really worse than Ohio? Comparing the two—and, more broadly, the regions subject to the renewed Voting Rights Act with those that are exempt—provides critical support for the statute’s validity.

My study of voting rights violations nationwide suggests that voting problems are more prevalent in places “covered” by the Act than elsewhere.¹ Professor Persily’s careful and measured defense of the renewed statute posits that this evidence is the best available to support reauthorization.² The evidence matters because if, as critics charge, the regional provisions of the Voting Rights Act (VRA) are no longer needed, minority voters should confront fewer obstacles to political participation in places where additional federal safeguards protect minority interests than in places where these safeguards do not operate. In fact, minority voters confront more.

Places like Texas—unlike places like Ohio—must get approval, or “preclearance,” from the federal government before changing any aspect of their voting practices.³ Known as section 5, this requirement rests on the presumption that changes to voting practices in regions with a history of discrimination in voting are discriminatory until local officials persuade federal authorities otherwise.⁴

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1. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 MICH. J.L. REFORM 643 (2006) [hereinafter Katz et al., *Documenting Discrimination*]; Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 187, 208 (Ana Henderson ed., 2007) [hereinafter Katz, *Not Like the South?*].
 2. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 194–96, 202–03, 207 (2007).
 3. See 42 U.S.C. § 1973c (2000).
 4. See *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

Many people think this presumption is no longer appropriate.⁵ “Times have changed,” posits the complaint in a pending lawsuit, and “long . . . remedied” are the conditions that once justified the imposition of a remedy as burdensome as preclearance.⁶

Times have indeed changed. Systematic state-sponsored discrimination openly directed at minority voters is no longer the norm and has not been for a long time. Adjudicated constitutional violations related to voting are relatively rare, minority voters now register and turn out at rates that compare favorably with those reported both nationally and in regions not subject to section 5, and voters now routinely elect minority candidates to local, state, and federal office.⁷

Remarkable progress to be sure, but is it enough to declare victory and throw out section 5? The Supreme Court would likely think so had Congress attempted to impose preclearance on covered jurisdictions for the first time only last year. The record Congress amassed to support the 2006 reauthorization of section 5 does not appear to document the type of widespread unconstitutional conduct the Justices have said must underlie the passage of new civil rights legislation.⁸ Insufficient evidence of rampant unconstitutional conduct led the Court to toss out six federal statutes over the last decade, statutes that sought to do things like promote religious freedom and remedy gender-motivated violence.⁹

Section 5, however, is not new. It was legitimately put in place more than forty years ago to address precisely the type of pervasive discrimination the

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5. See Katz, *Not Like the South?*, *supra* note 1, at 184 n.4 (citing opposition to reauthorization); Persily, *supra* note 2, at 182 n.21 (same).
 6. Complaint at 6, Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales, No. 1:06-cv-01284-PLF (D.D.C. Aug. 4, 2006).
 7. Persily, *supra* note 2, at 197, 199, 201-02.
 8. *Id.* at 193-94.
 9. Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001) (striking down attempted abrogation of state immunity in the Americans with Disabilities Act, 42 U.S.C. §§ 12,111-12,117 (2000)); United States v. Morrison, 529 U.S. 598, 614-19 (2000) (rejecting congressional power to subject private parties to liability under the Violence Against Women Act, 42 U.S.C. § 13,981 (2000)); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88-92 (2000) (striking down attempted abrogation of state immunity in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000)); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672-75 (1999) (same, for the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified as amended in scattered sections of 15 U.S.C.)); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640-47 (1999) (same, for the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296 (2000)); City of Boerne v. Flores, 521 U.S. 507, 530-32 (1997) (striking down the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2000)).

Court now requires as justification for new legislation.¹⁰ The continued legitimacy of section 5 should therefore not depend on evidence that such discrimination persists largely unchanged. If it did, Congress could reauthorize preclearance only if the statute were a failure.¹¹

No one thinks section 5 has been a failure. What is disputed is the scope of its success. Has section 5's efficacy in suppressing acts of discrimination brought about lasting changes in behavior and attitude such that section 5 could be scrapped without consequence? Or is the progress we have made fragile and dependent on section 5 continuing to block and deter misconduct that would find expression in its absence?

Nobody can know what would happen if the strictures of preclearance were lifted. Comparing covered and noncovered jurisdictions nevertheless suggests that section 5 is far from obsolete. My examination of claims brought under the core permanent provision of the VRA—known as “section 2”¹²—shows that minority voters remain more likely to confront obstacles to political participation in jurisdictions subject to section 5 than elsewhere. Plaintiffs bringing section 2 claims have been more likely to succeed,¹³ and remain more likely to succeed, than plaintiffs elsewhere.¹⁴ Courts hearing section 2 claims have been more likely to find intentional discrimination, extreme racial polarization in voting, and a lack of success by minority candidates in covered regions than in noncovered ones.¹⁵ Covered jurisdictions also account for the majority of the reported section 2 lawsuits in which plaintiffs achieved successful outcomes since 1982.¹⁶

10. See, e.g., *City of Boerne*, 521 U.S. at 518 (citing decisions upholding section 5 as examples of permissible enforcement legislation).

11. See Katz, *Not Like the South?*, *supra* note 1, at 185, 208.

12. 42 U.S.C. § 1973a (2000).

13. See Katz et al., *Documenting Discrimination*, *supra* note 1; Katz, *Not Like the South?*, *supra* note 1, at 185, 208.

14. Even as the total number of successful section 2 lawsuits nationwide has declined in recent years, plaintiffs remain more likely to succeed in covered jurisdictions. Between 1996 and 2005, plaintiffs in covered jurisdictions prevailed in 27.8% of the lawsuits filed, compared with a 21.5% success rate for plaintiffs in noncovered jurisdictions during this same period. To be sure, decisions from the early 2000s suggest this gap is closing, but the pace of litigation following post-census redistricting suggests that data from partial decades, and indeed, the early part of any decade may not be representative of the decade as a whole.

15. See Katz et al., *Documenting Discrimination*, *supra* note 1; Katz, *Not Like the South?*, *supra* note 1, at 185, 208. On minority electoral success, compare Persily, *supra* note 2, at 199 (“Nothing in the record, however, pointed to a difference in rates of minority officeholding between covered and uncovered jurisdictions.”).

16. See Katz et al., *Documenting Discrimination*, *supra* note 1, at 655–56 (noting sixty-eight successful plaintiffs' outcomes in covered jurisdictions and fifty-five elsewhere).

Professor Persily relies on this evidence to distinguish covered from noncovered jurisdictions and as support for the reauthorization of section 5's strictures exclusively in covered jurisdictions.¹⁷ In my view, comparing covered with noncovered jurisdictions is most valuable because the comparison offers a concrete way to measure section 5's success in covered jurisdictions. The section 2 data in particular provide a lens through which to gauge the extent to which section 5's success in controlling manifestations of racial discrimination amounts to a cure for the underlying disease.¹⁸

Section 2 and section 5 are not coextensive,¹⁹ but they are not wholly distinct, and a large number of electoral practices run afoul of both provisions. Where they overlap, preclearance should block implementation of the offensive practice and eliminate the need for plaintiffs to challenge it under section 2. In fact, section 5 has done just that. Both before 1997, when the Department of Justice viewed a violation of section 2 as reason to deny preclearance under section 5,²⁰ and since then, when overlap in substance has supported the same result, section 5 has blocked implementation of many electoral practices that would have likely prompted a successful section 2 challenge.

This particular screening effect explains why, for example, three-judge trial panels decided more than four times as many section 2 cases in noncovered jurisdictions as in covered ones since 1982. In covered regions during this period, the Justice Department denied preclearance to dozens of districting plans of the type that, if challenged under section 2, would have been most

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17. Persily, *supra* note 2, at 207 (“[Section 2 case data] provides the best systematic evidence to distinguish covered from noncovered jurisdictions [and] will provide the greatest help for a court wishing to hang its hat on systematic data that justifies the current coverage formula.”).
 18. See Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 31 (2007); Ellen D. Katz, *Congressional Power To Extend Preclearance: A Response to Professor Karlan*, 44 HOUS. L. REV. 33, 37 (2007).
 19. Unlike section 5, section 2 applies nationwide and importantly presumes state action to be valid absent proof establishing a statutory violation. Section 2 prohibits some conduct that might pass muster under section 5 and permits various practices for which preclearance would be denied. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (holding that a districting plan’s apparent compliance with section 2 does not establish that preclearance is warranted under section 5); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (holding that an apparent violation of section 2 is not grounds to deny preclearance under section 5).
 20. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55(b) (2007)) (providing Department of Justice regulation instructing that preclearance be denied to any “clear violation of Section 2”); see also S. REP. NO. 97-417, at 12 n.31 (1982), reprinted in 1982 U.S.C.A.N. 177, 189 (“In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.”). The Supreme Court invalidated this policy in *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

likely to be heard by a three-judge panel.²¹ Comparably few such section 2 claims materialized in covered jurisdictions precisely because section 5 blocked implementation of the underlying plans.²²

By definition, section 5 screens conduct only in covered jurisdictions. As a result, if these jurisdictions have been “cured,” they should account for fewer successful section 2 lawsuits than noncovered ones, where section 5 does not operate. But this is not the case. Section 2 plaintiffs have been more likely to succeed and in fact have succeeded more often in covered jurisdictions. Even at the local level, where preclearance operates most vigorously to block electoral changes,²³ section 2 challenges have been more likely to succeed in covered than in noncovered jurisdictions.²⁴

One can of course “quibble” with the section 2 data.²⁵ My study did not track section 2 lawsuits that failed to produce published opinions nor did it control for things like judicial predilections for interpreting the VRA narrowly or expansively. The results might accordingly be challenged to the extent that factors such as these vary systematically between covered and non-covered jurisdictions in a manner that offers an alternative explanation for the disparities observed.

What we do know, however, suggests that a fuller accounting of section 2 litigation would reveal an even greater proportion and number of successful plaintiff outcomes in covered jurisdictions than in noncovered ones. First, we know that many section 2 claims end with settlements that offer plaintiffs substantial relief but no fully adjudicated—or published—judgment.²⁶ The total number of such settlements is not known, but nothing suggests that noncovered jurisdictions account for a greater number of them. In fact, just the opposite appears to be true. *Dillard v. Crenshaw County*,²⁷ for example, involved a successful section 2 challenge to the use of at-large elections in several Alabama counties. *Dillard* prompted challenges to similar practices in an additional 180 Alabama jurisdictions, most of which settled in a manner

21. 28 U.S.C. § 2284(a) (2000) (providing that three-judge trial panels are to be convened to hear challenges to the constitutionality of statewide or congressional apportionment plans).

22. Ellen D. Katz & Anna Baldwin, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 COLUM. L. REV. SIDEBAR (forthcoming 2008).

23. See Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion To Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612 (2005) (arguing that the greatest impact of Section 5 and the VRA has been to police voting discrimination at the local level).

24. See Katz et al., *Documenting Discrimination*, *supra* note 1, at 655.

25. Persily, *supra* note 2, at 206.

26. See Katz et al., *Documenting Discrimination*, *supra* note 1, at 654–55.

27. 640 F. Supp. 1347 (M.D. Ala. 1986).

favorable to the plaintiffs.²⁸ The record of published section 2 cases in Alabama captures but a fraction of the statute's true effect in this covered state.

Second, while judicial proclivities might explain the greater proportion and number of successful section 2 claims in covered jurisdictions, they would do so only to the extent that the judges most likely to favor liability decided a disproportionate number of the cases in these jurisdictions. To be sure, some judges have been more likely to favor liability than others. In particular, judges who are African American or who were appointed by Democratic presidents have been more likely to vote for liability than their white and Republican colleagues. But these judges were not disproportionately located in covered jurisdictions.²⁹

Third, while the number of successful lawsuits does not indicate the severity of the underlying statutory violations, the section 2 violations identified in covered jurisdictions appear to be more clear-cut and less vulnerable to challenge than those found in noncovered regions. Section 2 defendants were more likely to prevail on appeal in noncovered jurisdictions than in covered ones, while plaintiff-initiated appeals were more likely to succeed in covered regions. This suggests that trial judges in covered jurisdictions, if anything, appear to have read Section 2 too restrictively.³⁰

Release from section 5 should not require covered jurisdictions to get rid of every vestige of past discrimination. Nor should these jurisdictions be required to eliminate the prospect of future misconduct. But the section 2 evidence suggests that regions subject to section 5 have not done enough to dismantle obstacles to minority political participation. The evidence suggests that they must do more than they have before conventional legal remedies will suffice to address the problems that arise everywhere. Only then will section 5 have accomplished its mission. We are not there yet.

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28. See Peyton McCrary et al., *Alabama*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 38, 53-54 (Chandler Davidson & Bernard Grofman eds., 1994).

29. See Katz & Baldwin, *supra* note 22; cf. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. (forthcoming 2008) (noting judicial proclivities).

30. See Katz & Baldwin, *supra* note 22.